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No. 83-912

In The

Supreme Court of the United States

October Term, 1983

EDWARD LUCE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITIONER'S BRIEF ON MERITS

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QUESTION PRESENTED

Whether a defendant may appeal a ruling denying his motion *in limine* to preclude the introduction of a prior conviction, when, as a result of that ruling, the defendant later decides not to testify.

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PETITIONER'S BRIEF ON MERITS

OPINION BELOW

The opinion of the Court of Appeals (Pet. App. 1a-13a) is reported at 713 F.2d 1236 (6th Cir. 1983).

JURISDICTION

The Judgment of the Court of Appeals was entered on August 9, 1983. A petition for rehearing with *en banc* suggestion was denied on October 3, 1983 (Pet. App. 14a). The petition for a writ of certiorari was filed within 30 days of that denial. This Court granted certiorari on March 26, 1984 (J.A.31). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Rule 609 (a) of the Federal Rules of Evidence, reads as follows:

IMPEACHMENT BY EVIDENCE OF CONVICTION OF CRIME

(a) General rule. For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted if elicited from him or established by public record during cross-examination but only if the crime (1) was punishable by death or imprisonment in excess of one year under the law under which he was convicted, and the court determines that the probative value of admitting this evidence out-weighs its prejudicial effect to the defendant, or (2) involved dishonesty or false statement, regardless of the punishment.

STATEMENT OF THE CASE

Petitioner, Edward Luce, was convicted by a jury of conspiracy and possession with intent to distribute cocaine, in violation of 21 U.S.C. 846 and 841 (a).[1] The trial judge sentenced him to concurrent terms of four years imprisonment and fined him $6,000.00, to be followed by a three (3) year special parole term. On appeal the Sixth Circuit Court of Appeals affirmed the convictions (Pet. App. 1a-13a).

The evidence at trial showed that on September 29, 1981, Tennessee State Drug Agents arrested Dallas Luigs, an unindicted co-conspirator, and charged him with possession of three ounces of cocaine and some quaaludes (R. 41, 67). Sometime after his arrest Luigs agreed to cooperate with State drug agents, who, in return, assured him that the federal authorities would not bring charges against him and that the State authorities would be notified about his cooperation through a "letter of recommendation" (R. 42-43). Once his "deal" was secured Luigs told investigators that he purchased cocaine from his cousin, James Luigs (R. 67). The State agents then instructed him to make another purchase of cocaine from James.

Acting on his cousin's request to purchase cocaine, James Luigs flew to Memphis from Chicago on October 1, 1981. After meeting at the airport, they drove to a local Holiday Inn where they were joined by Robert Kol-

[1]Petitioner was acquitted on Count II which also charged a violation of the federal drug laws. Co-defendant James Luigs was convicted on the same two counts, while Robert Kolofer was convicted on the possession count.

ofer, a co-defendant (T. 69). Thereafter, both were arrested in the hotel parking lot and, inside the trunk of the car, the agents recovered an attache case that, when opened, revealed a brown paper bag containing a large plastic bag filled with 16 smaller plastic bags (T. 70, 207-208). The small plastic bags were filled in part with a substance containing cocaine. One of Edward Luce's fingerprints was found on one of the plastic bags (T. 227, 262-263).[2]

In December 1981, DEA Agents obtained a warrant for Luce's arrest on charges in this case. When they initially went to Luce's office he was not there. In an unmarked squad car they returned that night, dressed in plain clothes. In the darkness they saw Luce enter his car, at which time they approached him, shined a flashlight in his face, and pointed the headlights of their car directly at him (T. 274-275). At a distance of approximately 50 feet one officer displayed his badge, while the other officer announced his office (T. 275). Luce started his car and left while the officers got back in their car to follow (T. 275). Upon seeing the first marked police vehicle Luce stopped and submitted to arrest (T. 275-276).

At trial Luce filed a motion *in limine* to exclude evidence of an earlier conviction, stating in his motion that he would testify in his defense (J.A.4). Luce argued in

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[2]While the contents of five of the sixteen bags were tested for illicit drugs, the remaining eleven bags went untested (T. 159). No evidence was ever introduced as to which bags contained cocaine and which bags did not. Significantly, the investigating officer could not identify on which bag Luce's print was found (T. 234). The Court, over objection, allowed the officer's testimony to stand (T. 236).

his motion that the prior conviction could not be proper impeachment evidence because Luce had been sentenced under Illinois' Special First Offender Probation Law for a marijuana offense, Ill. Rev. Stat. Chapter 56½, § 710, which provides that the criminal proceedings be dismissed and no conviction entered if defendant completes his probation satisfactorily. Alternatively, Luce argued that the conviction was improper impeachment evidence under Federal Rule of Evidence 609 because its prejudicial effect outweighed its probative value (J.A.6). It was later learned that the earlier conviction had been for possession of a controlled substance, not marijuana.[3] In response to the defense motion, the judge ruled that since the earlier crime involved moral turpitude, if the defendant chose to testify it would be admitted as impeachment (J.A.18). The Court, however, offered to preclude use of the conviction as impeachment if Luce limited his testimony to a response to the evidence of flight (J.A. 19-20). Luce declined this invitation and chose not to testify at his trial.

After the jury's verdict, Luce filed a post trial motion for Judgment of Acquittal or in the Alternative for a New Trial (J.A.24), based in part on the judge's earlier ruling denying his motion *in limine*. Once again the judge ruled that the prior conviction was "a drug offense in which in the Court's view, was both a felony and involved moral

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[3]Section 1410 of the Illinois Controlled Substances Act, however, contains similar expungement provisions for first offenders as does the Illinois Cannabis Control Act. In any event, the Government never provided the Court or the defense with the specific charge pursuant to Rule 16 of the Federal Rules of Criminal Procedure.

turpitude" (J.A.27). The judge denied Luce's post trial motion.

On appeal, the defendant contended *inter alia* that the trial court failed to apply the proper balancing test mandated by Rule 609 (a) (1) with respect to his prior conviction. The Court of Appeals declined to reach this issue since Luce had failed to testify in his own behalf and therefore had not been impeached with his prior conviction (Pet. App. 2a-12a).

Thereafter, this Court granted a petition for a writ of certiorari to review the decision of the United States Court of Appeals for the Sixth Circuit (J.A.31).

SUMMARY OF ARGUMENT

The Sixth Circuit Court of Appeals has erroneously ruled that a defendant who does not testify waives his right to appeal the trial judge's denial of his motion *in limine* to exclude the introduction of a prior conviction under Federal Rule of Evidence 609. While not expressly addressing the question in its form here, in both *Brooks v. Tennessee,* 406 U.S. 605 (1972) and *New Jersey v. Portash,* 440 U.S. 450 (1979), this Court did reach the merits of questions touching on the Fifth Amendment even though the defendants did not take the stand. The instant case bears a close resemblance to *Brooks,* which struck down a Tennessee statutory rule requiring a defendant to testify before any other defense witnesses. Responding to the suggestion that the defendant had waived an attack on the rule's violation of his Constitutional right

when he declined to testify, this Court observed that "the Tennessee rule imposed a penalty for petitioner's initial silence, and that penalty constitutes the infringement of the right." *Brooks v. Tennessee,* 406 U.S. at 611 n.6. While the rule in *Brooks* imposed a penalty on defendant's right *not* to testify, the trial judge's ruling here imposed a penalty on defendant should he exercise his Constitutional right *to* testify. As such, the ruling must be appealable.

An error that keeps the defendant off the stand can be the most significant error in the defendant's trial. Indeed, this Court has recognized that "the testimony of an accused denying the case against him has considerably more force than counsel's argument that the prosecution's case has not been proved." *McGautha v. California,* 402 U.S. 183, 217 (1971). The alternative of scrupulously preserving the issue for appeal by testifying and enhancing the possibility of conviction is unrealistic because it ignores the fact the defendant's single most important goal at trial is acquittal, not injection of appealable error. It does not withstand reason to hold that the defendant waives the issue when, in an effort to compensate for the judge's erroneous ruling and win his case in spite of it, the defendant does not offer his own testimony.

The defendant's decision whether to testify or not is an important tactical decision as well as a matter of Constitutional right. *Brooks v. Tennessee,* 406 U.S. at 612. This right is diluted if a waiver arises when the defendant is forced into relinquishing his Constitutional right to testify in response to an erroneous ruling by the trial judge.

ARGUMENT

The question presented here is whether a defendant may appeal denial of a motion *in limine* to exclude a prior conviction, when, after an adverse ruling, the defendant declines to testify. Every circuit that has considered the issue but the Sixth has held, explicitly or implicitly, that such an adverse ruling is appealable. While the supporting rationales and procedural niceties formulated by each circuit have not been entirely uniform, none have adopted the blanket approach articulated by the Sixth Circuit that would preclude review unless the defendant responds to the ruling by taking the witness stand, suffering the impeachment, and enhancing his chances of conviction.[4]

Two cases from this Court shed light on the problem; and, while neither squarely addressed the issue in its form here, in both cases this Court reviewed preliminary rulings where the defendants, as a result of the rulings, declined to testify. In the first, *Brooks v. Tennessee,* 406 U.S. 605 (1972), this Court reviewed a Tennessee statutory requirement that compelled a defendant to testify before any other defense witness. This Court struck down the measure as unconstitutional despite the defendant's election in that case not to testify. While the dissenters suggested that there could be no violation of the right against self-incrimination because Brooks never testified, the majority rejected that notion with the observation that "the Tennessee rule imposed a penalty for petitioner's initial silence, and that penalty constitutes the infringement of

[4]In its support for the Petition for Writ of Certiorari, at pages 6-8 nn. 5-11, the Government catalogues the various approaches adopted by the Circuits in addressing the issue.

the right." *Id.* at 611 n.6. The instant case is not so different from *Brooks* so as to justify a different result. While the Tennessee rule in *Brooks* imposed a penalty on defendant's initial exercise of his constitutional right *not* to testify, the trial judge's ruling here imposed a penalty on defendant should he exercise his constitutional right *to* testify. In both bases defendants faced rulings that imposed grave consequences on their decisions whether to give testimony on their own behalfs. In both circumstances defendants' decisions whether or not to testify were made in direct response to a preliminary ruling. This Court observed in *Brooks* that the Tennessee rule "cuts down on the privilege [to remain silent] by making its assertion costly." *Id.* at 610-11, quoting *Griffin v. California,* 380 U.S. 609, 614 (1965). The difference in petitioner's case is that the ruling by the trial judge here, if erroneous, cuts down on petitioner's privilege to *offer* testimony, by making that assertion costly. The question in *Brooks* and the question here present the two sides of one coin. The significant point is that in each case the ruling directly and substantially influenced the defendant's decision whether or not to exercise his Constitutional right to testify.

In the second case, *New Jersey v. Portash,* 440 U.S. 450 (1979), the defendant had moved *in limine* to preclude the state trial court from using immunized grand jury testimony against him should he testify. The trial court denied the motion, and the defendant did not testify as a result. New Jersey argued to this Court what the Government argues here—that the constitutional question is not presented when the defendant does not testify and therefore the impeaching testimony is never offered.

Before deciding the substantive issues in defendant's favor, this Court offered three grounds for reaching them: 1) the New Jersey trial court did rule on the merits of the constitutional question; 2) the New Jersey appellate court "necessarily concluded that the federal constitutional question had been properly presented"; and, 3) there was nothing in federal law to prohibit New Jersey from following such a procedure or to foreclose this Court's attention to it so long as the "case or controversy" requirement of Article III was met. *Id.* at 454-55. As Justice Powell pointed out in his separate concurring opinion, these reasons indicated that the majority did not intend to decide "whether it would regard the constitutional issue as having been properly presented if this case had arisen in federal court." *Id.* at 462-63 n.2. Nevertheless, it is instructive that in *Portash* as well as in *Brooks,* this Court elected to reach the merits of questions touching the Fifth Amendment right to testify despite the fact that in neither case did the defendant actually take the stand. *See United States v. Cook,* 608 F.2d 1175, 1186 (9th Cir. 1979) (en banc), *cert. denied,* 444 U.S. 1032 (1980).

The instant case involves the proposed introduction of a prior conviction, a piece of evidence that, not insignificantly, cannot be introduced automatically against a testifying defendant. This is in part because a prior conviction does not help the Government make a particular element of its case more or less probable; it serves only to impeach a defendant's credibility. Thus, Rule 609 enumerates several initial requisites and then requires the trial judge to balance other factors to insure that the prejudicial effect of the conviction's introduction does not outweigh its probative value. It depreciates the value

of the defendant's right to testify if he cannot appeal what may be the most significant error in his trial, an error that keeps him off the stand, because, in an effort to compensate for the error and win his case in spite of it, the defendant does not offer his own testimony. This injustice is especially egregious because the defendant has failed to testify in response to evidence that will not even specifically impeach or otherwise answer a particular aspect of his testimony. A prior conviction is not introduced to rebut something the defendant may say at trial—it is a collateral matter, offered to impeach the defendant's credibility generally. Any error allowing such impeachment at the expense of the Fifth Amendment right to testify must be appealable.

No wonder then that every federal circuit considering this issue, save the Sixth Circuit, has found some way to consider a claim of error in the admission of impeachment by way of a prior conviction even where the defendant declines to testify. Several of these courts specifically endorse a preliminary ruling as the preferred method of deciding Rule 609 issues, because it enables the defendant to make appropriate choices in preparing and structuring his case. *See United States v. Fearwell,* 595 F.2d 771, 779 n.22 (D.C. Cir. 1978); *United States v. Oakes,* 565 F.2d 170 (1st Cir. 1977); *United States v. Jackson,* 405 F.Supp. 938 (E.D. N.Y. 1975). This Court has recognized that the defendant's decision to testify "is an important tactical decision as well as a matter of constitutional right." *Brooks v. Tennessee, supra,* 406 U.S. at 612. No one has ever suggested that a ruling on this issue before a defendant testifies works any disadvantage to the prosecutor, who can also use the knowledge gained from the advance

ruling to better prepare his own case. If the enlightened view is that trials should not be fraught with surprise, then a motion *in limine* ruling with respect to Rule 609 is the preferred method of proceeding and the correctness of the ruling should be reviewable on appeal.

The Fifth Amendment privilege has two sides; not only does it guarantee the right not to testify, but the right to testify is also constitutionally guaranteed. No defendant can possibly make a knowing and voluntary choice regarding whether to testify when he does not know until afterwards whether his testimony will invite introduction of the most damaging impeachment possible against him. *Cf. Brewer v. Williams,* 430 U.S. 387 (1977); *United States v. Halbert,* 668 F.2d 489 (10th Cir.), *cert. denied,* 456 U.S. 935 (1982). Forcing the defendant to wait until he testifies before deciding whether a prior conviction will be admitted also makes for ineffective assistance of counsel, as no attorney could reasonably advise his client about the consequences of his testimony when he does not know whether he will be impeached by a prior conviction.

The fact is that a preliminary 609 (a) (1) ruling can dictate the course of the entire trial, and, as such, must be subject to judicial review. *See United States v. Cook, supra,* 608 F.2d at 1183. An error in this ruling requires the defendant to make a choice he otherwise might not have made. The suggestion that a defendant abandons his claim to appeal an erroneous ruling which so seriously effects his right to testify is unrealistic. *United States v. Kiendra,* 663 F.2d 349 (1st Cir. 1981); so is the suggestion that he scrupulously preserve the issue for appeal by testifying at the risk of conviction. One reason

offered in support of waiver is that a reviewing court will have no way of knowing whether a defendant actually would have exercised his right to testify when the appropriate moment arose; another is that a reviewing court will have no way of knowing the content of the defendant's testimony and therefore it could not determine whether the testimony would have influenced the outcome of the trial. This last argument suggests that the doctrine of harmless error outweighs serious infringements upon constitutional rights. In fact, the same argument could have been made to avoid reaching the issue in *Brooks.* Moreover, in other areas this Court has concluded that where constitutional issues are raised the question of prejudice need not be considered. *See, e.g., Holloway v. Arkansas,* 435 U.S. 475, 490-91 (1978). It is eminently more sensible to assume that the defendant would have testified and that his testimony would have been relevant, than it is to assume that he had nothing worthwhile to offer or that he made the motion as a ruse never intending to testify in the first place. *See United States v. Kiendra,* 663 F.2d at 352. It is certainly more just to tolerate the occasional ruse than to preclude an appeal when a trial judge makes an error of constitutional proportions.[5] If the Government is so convinced that a defendant does not intend to testify and is merely looking to place error in the record, then the Government has no need to contest the Rule 609 motion.

In fact, few judges have ever been reversed where a trial court balanced the competing interests and con-

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[5]Moreover, defense counsel as officers of the Court are deemed to file motions in good faith. A.B.A. Model Rules of Professional Conduct 3.1 and 3.3.

cluded that the prior conviction was admissible. This deference to trial judges should assuage any fears that ruling in favor of appealability will offer calculating defendants two chances in every trial, one without their testimony and a later chance, after their successful appeals, with their testimony. At trial, the defendant has but one goal—to obtain an acquittal. *United States v. Cook,* 608 F.2d at 1193 (Hufstedler, J., dissenting). In any event, putting aside the dubious notion that criminal defendants routinely elevate appealable error over acquittal as the object of their strategy, the history of appeals of Rule 609 motions shows that reversal will occur only in the most clear and intolerable instances of trial court error. And the very fact that appellate courts have been able to review the rulings answers the charge that a ruling on a Rule 609 motion, when the defendant fails to testify, is hypothetical.[6] Prior to trial the trial judge has all the information he needs in order to make a ruling on the admissibility of the prior conviction under Rule 609, and no factors are added when the defendant testifies which will affect that decision. If something did occur during the course of the trial, the trial court would certainly be free to modify its ruling. *See United States v. Oakes, supra; United States v. Jackson, supra.* This fear, moreover, that a defendant who knows his prior conviction will be inadmissible will now be able to lie with impunity, ignores the fact that Rule 609 applies to admissions of prior convictions for impeachment of truthfulness only. The conviction could come in,

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[6]Conversely, the fact that trial judges continue to rule on motions *in limine* concerning Rule 609 in the face of appellate review answers the charge that allowing review makes trial judges hesitant to rule on such motions.

for instance, under Rule 404,[7] or if the defendant got on the stand and flatly denied prior involvement in the area of the conviction. *See, e.g., United States v. Gaertner,* 705 F.2d 210, 216-17 (7th Cir. 1983); *United States v. Mehrmanesh,* 682 F.2d 1303, 1309 (9th Cir. 1982).

The facts in the instant case present a classic example of the unfairness of a rule precluding review when the defendant declines to testify. Federal Rule 609 (a) (1) provides that a prior conviction less than 10 years old may be admitted to impeach credibility only when the prior crime was punishable by death or imprisonment in excess of one year under the law under which he was convicted, and when the Court determines that the probative value of admitting the evidence outweighs its prejudicial effect to the defendant. The trial judge here never attempted any balancing when he ruled flatly that the Government could show in its cocaine prosecution that the defendant had been convicted of a drug related crime eight years earlier. The trial judge indicated that the earlier crime was a felony involving moral turpitude and would be admitted if the defendant testified. Attempting to bolster his ruling, the judge said that unless the conviction were shown the defendant could misrepresent himself to the jury as being unfamiliar with drugs (J.A.21). This analysis by the trial judge contains undocumented speculation and is inconsistent with decisions from this Court,

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[7]Federal Rule of Evidence 404 (b) states that "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."

appellate courts, and with the rules embodied in the Federal Rules of Evidence. Only by "attempting to prove his good name" does a criminal defendant open the entire subject of his character, *Michelson v. United States,* 335 U.S. 469, 479 (1948). In addition, adverse character testimony by the Government must be limited to the scope of the favorable testimony the defense offers. *Williams v. United States,* 168 U.S. 382, 397 (1897). *See also Michelson v. United States, supra,* 335 U.S. at 484 ("The cross-examination may take in as much ground as the testimony it is designed to verify."); *Agnello v. United States,* 269 U.S. 20, 35 (1925). Thus, adverse character testimony is not admissible until the defendant raises the question, 3A *Wigmore on Evidence* § 88 (3d ed. 1940); Fed. R. Ev. 424 (a) (1), and courts have consistently held that a defendant must be free to deny all elements of the case against him without placing his character in issue. *United States v. Holmes,* 26 Fed. Cases 349, 354 (D. Maine 1858); *United States v. Tomaiolo,* 249 F.2d 683 (2d Cir. 1957). In any event, aside from his misunderstanding about character impeachment generally, the trial judge made no effort to apply any of the balancing considerations mandated by Rule 609 (a) (1). *See, e.g., Gordon v. United States,* 383 F.2d 936 (D.C. Cir. 1967), *cert. denied,* 396 U.S. 1030 (1970); *United States v. Harding,* 525 F.2d 84, 89 (7th Cir. 1975); *United States v. Palumbo,* 401 F.2d 270 (2d Cir. 1968), *cert. denied,* 394 U.S. 947 (1969); *Weinstein's Evidence,* § 609 [03] (1976), and cases cited therein. Here, every relevant factor indicated exclusion was proper: age of the earlier conviction, similarity to current charge, effect on defendant's decision to testify. If the trial judge feared that Luce would misrepresent himself he could

have modified his ruling when and if the deception occurred. *See United States v. Oakes, supra; United States v. Jackson, supra.*

The Sixth Circuit's interpretation of waiver lets stand the trial judge's decision and thereby dilutes the value of defendant's constitutional right to offer testimony in his own behalf. In spite of the fact that the judge here may have misconstrued the law and failed to make any effort to balance the appropriate facts, thereby forcing the defendant into making a choice of constitutional proportion that he should not have had to make, the Sixth Circuit would find a waiver and allow the judge's erroneous ruling to be unappealable. Yet this erroneous ruling forced defendant out of exercising his constitutional right to testify in his own behalf. The doctrine of waiver cannot in fairness be stretched to the point that the Sixth Circuit finds here.

"[T]he testimony of an accused denying the case against him has considerably more force than counsel's argument that the prosecution's case has not been proved." So said this Court in *McGautha v. California,* 402 U.S. 183, 217 (1971), thus giving explicit recognition to the significance of a defendant's own testimony. The decision on whether or not to testify is not just a simple question of trial strategy. Indeed, a defendant is far more likely to testify as long as he has no record subject to introduction against him. Thus, when a trial judge makes an erroneous ruling under Rule 609, coercing a defendant into relinquishing his constitutional right to offer his own testimony, logic dictates that the ruling be subject to review. *United States v. Cook, supra,* 608 F.2d at 1183.

CONCLUSION

Because of the foregoing the decision of the United States Court of Appeals should be reversed.

Respectfully submitted,

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